

# Carrots, Sticks, and Problem Drug Use: Law Enforcement’s Contribution to the Policy Discourse on Drug Use and the Opioid Crisis

*“Why complete drug treatment, if one can’t go to prison?”  
-Ohio Common Pleas Judges Association*

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	765
II.	BACKGROUND.....	770
	A. <i>Pressure Group Behavior</i> .....	770
	B. <i>Policy Narratives</i> .....	771
III.	LAW ENFORCEMENT GROUPS’ NARRATIVES DEFINING THE OPIOID CRISIS .....	772
	A. <i>The Addict as the “Bad Guy”</i> .....	773
	B. <i>Carrots and Sticks</i> .....	775
	C. <i>The Drug Traffickers as the Bad Guys</i> .....	777
	D. <i>Law Enforcement Groups as Active Participants in the Health Approach</i> .....	780
IV.	THE LAW ENFORCEMENT NARRATIVE CONTINUUM .....	782
V.	CONCLUSION.....	785

## I. INTRODUCTION

Despite the growing support for the idea that problem drug use should be treated like a chronic medical disease,<sup>1</sup> some law enforcement interest groups, including trial court judges associations, prosecuting attorneys associations, and police associations (“law enforcement groups” or “criminal justice actors”), continue to argue for the use of the criminal justice system to address the

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<sup>1</sup> See, e.g., Taleed El-Sabawi, *Defining the Opioid Epidemic: Congress, Pressure Groups, and Problem Definition*, 48 U. MEM. L. REV. 1357, 1359 (2018).

nation's drug crises.<sup>2</sup> The justification for the use of the criminal justice system to oversee the psychological and medical treatment of persons with substance use disorders (SUDs) is based on the belief that persons with SUDs are deviants, who cannot refrain from engaging in sinful behavior.<sup>3</sup> Therefore, punishment, or the threat thereof, is needed to deter the deviants' immoral conduct and to ensure that the deviants comply with treatment.<sup>4</sup> Law enforcement groups have also argued that incarceration is an effective method to "dry out" someone suffering from a SUD, through a forced detox, thereby encouraging entry into treatment.<sup>5</sup>

The empirical evidence that supports the efficacy of coerced and compulsory treatment is underwhelming, at best, and ineffective, at worst.<sup>6</sup> Furthermore, treatment outcomes for persons with SUDs enrolled in substance abuse treatment without the threat of incarceration are equal to, if not superior than, those under supervision of the criminal justice system.<sup>7</sup> Those entering treatment through means independent of the criminal justice system have the additional benefits of not suffering the stigma that results from a criminal

<sup>2</sup> See, e.g., *Prescription Drug and Heroin Abuse Issues Before the H. Energy and Commerce Comm. and the H. Subcomm. on Oversight and Investigations*, 114th Cong. (2015) (statement of Victor Fitz, Cass County, Michigan Prosecutor & President, Prosecuting Attorneys Association of Michigan), <https://docs.house.gov/meetings/IF/IF02/20150326/103254/HHRG-114-IF02-Wstate-FitzV-20150326.pdf> [<https://perma.cc/2STG-49BF>] [hereinafter *Prescription Drug and Heroin Abuse Issues*]; Press Release, Statement from the Chambers of the Chief Justice, Maureen O'Connor, The Hidden Disaster of State Issue 1 (Aug. 28, 2018), <http://ohiopa.org/oconnor1.pdf> [<https://perma.cc/PMM2-MHLT>]; Press Release, Statement from OSBA President Robin Weaver: Ohio State Bar Association Opposes State Issue 1 (Sept. 13, 2018), <https://www.ohiobar.org/about-us/media-center/osba-news/statements/statement-from-osba-president-robin-weaver-ohio-state-bar-association-opposes-state-issue-1/> [<https://perma.cc/5EDJ-9HSM>] [hereinafter OSBA Statement]; Press Release, Statement of the Ohio Common Pleas Judges Association regarding Ohio Issue One (Aug. 14, 2018), <https://moritzlaw.osu.edu/depc/wp-content/uploads/sites/115/2018/08/Ohio-Common-Pleas-Judges-Association-media-release.pdf> [<https://perma.cc/9UQE-5X43>]; *State Issue 1: A Safe Harbor for Drug Traffickers and Violent Offenders*, OHIO PROSECUTING ATT'YS ASS'N (2018), <http://ohiopa.org/noon1.html> [<https://perma.cc/2KVV-XTEK>] [hereinafter *Safe Harbor*].

<sup>3</sup> See generally EDWIN M. SCHUR, *CRIMES WITHOUT VICTIMS* 3–7 (1965) (for an overview of the historic use of the deviancy narrative and the purported justifications for its use).

<sup>4</sup> See generally Rebecca Tiger, *Drug Courts and the Logic of Coerced Treatment*, 26 SOC. F. 169 (2011).

<sup>5</sup> See *id.* at 174–75; see also *Prescription Drug and Heroin Abuse Issues*, *supra* note 2.

<sup>6</sup> Dan Werb et al., *The Effectiveness of Compulsory Drug Treatment: A Systematic Review*, 28 INT'L J. DRUG POL'Y 1, 7–8 (2016).

<sup>7</sup> See *id.*

record<sup>8</sup> and do not incur the additional taxpayer dollars spent paying for the requisite law enforcement oversight.<sup>9</sup>

Despite the empirical literature, some law enforcement groups continue to make statements, underscored with assured certainty, that the threat of incarceration is a necessary tool to treat SUDs and to address the nation's current opioid crisis.<sup>10</sup> For example, in response to a 2018 Ohio Ballot Issue proposing a decrease in criminal penalties for simple possession and reallocating dollars saved to treatment services,<sup>11</sup> the Chief Justice of the Supreme Court of Ohio wrote in the Supreme Court's official position statement,

Drug courts would be impeded by taking jail time off the table. We know, through multiple studies, that drug courts are effective only when they combine the “carrot” of treatment and support with the “stick” of judicial accountability, including incarceration when needed. It is this carrot-and-stick approach that enables judges and drug court teams to use a variety of tools to help people overcome addiction. But Issue 1, while providing a lot of carrots by expanding treatment, takes away the stick. . . . We are talking about Ohio becoming, in effect, unable by its constitution to offer drug court participation and to incentivize that involvement by the “carrot” of not having a felony conviction record. Who would want to participate in a drug court program knowing that they only face probation for possession of fentanyl, cocaine, methamphetamine, K2, heroin, and so forth?<sup>12</sup>

<sup>8</sup> See Jordan Blair Woods, *A Decade After Drug Decriminalization: What Can the United States Learn from the Portuguese Model?*, 15 U. D.C. L. REV. 1, 24 (2011).

<sup>9</sup> KENNETH J. MEIER, *THE POLITICS OF SIN* 249 (1994).

<sup>10</sup> See, e.g., Press Release, Buckeye State Sheriffs' Ass'n, Sheriffs Blast Issue 1: Irresponsible for Ohio (Sept. 19, 2018), <http://www.ohiojudges.org/Document.ashx?DocGuid=389edd01-7fc2-43b1-871e-109a367905a0> [<https://perma.cc/A73H-QZBL>].

<sup>11</sup> Amendment stated as follows:

If adopted, the amendment would . . . [in part] [m]andate that criminal offenses of obtaining, possessing, or using any drug such as fentanyl, heroin, methamphetamine, cocaine, LSD, and other controlled substances cannot be classified as a felony, but only a misdemeanor. Prohibit jail time as a sentence for obtaining, possessing, or using such drugs until an individual's third offense within 24 months. Allow an individual convicted of obtaining, possessing, or using any such drug prior to the effective date of the amendment to ask a court to reduce the conviction to a misdemeanor, regardless of whether the individual has completed the sentence. Require any available funding, based on projected savings, to be applied to state-administered rehabilitation programs and crime victim funds. Require a graduated series of responses, such as community service, drug treatment, or jail time, for minor, non-criminal probation violations.

Ohio Issue 1, Proposed Constitutional Amendment, “To Reduce Penalties for Crimes of Obtaining, Possessing, and Using Illegal Drugs” (Aug. 22, 2018), [https://www.sos.state.oh.us/globalassets/ballotboard/2018/2018-11\\_issue1\\_certifiedballotlanguage.pdf](https://www.sos.state.oh.us/globalassets/ballotboard/2018/2018-11_issue1_certifiedballotlanguage.pdf) [<https://perma.cc/77RV-ZCBH>].

<sup>12</sup> O'Connor, *supra* note 2.

Ohio's Chief Justice's narrative was echoed by statements from the Ohio State Bar Association,<sup>13</sup> the Ohio Prosecuting Attorneys Association,<sup>14</sup> the Ohio Common Pleas Judges Association,<sup>15</sup> the Fraternal Order of Police of Ohio,<sup>16</sup> the Ohio Chief Probation Officers Association,<sup>17</sup> the Ohio Association of Chiefs of Police,<sup>18</sup> and the Buckeye State Sheriffs' Association.<sup>19</sup>

Stances such as those by these law enforcement groups in Ohio are not unique to state laws and politics; local prosecuting attorneys associations and

<sup>13</sup> President Weaver stated as follows:

We firmly believe that treatment and rehabilitation are the right strategies for curbing Ohio's opiate crisis and have seen them working in drug courts around the state. However, when you categorically strip our judges of their discretion and take away an important tool—the threat of prison time—you significantly lower the chances that they will get sober, enroll in and complete a drug treatment program.

OSBA Statement, *supra* note 2.

<sup>14</sup> *Safe Harbor*, *supra* note 2 (“Research and experience clearly demonstrate that without court intervention, including possible incarceration, addicts are less likely to seek treatment. The amendment will cost some addicts their lives.”).

<sup>15</sup> Ohio Common Pleas Judges Association, *supra* note 2 (“Loved ones of drug dependent individuals will lose their last chance to help their addict get clean in the criminal justice system.”).

<sup>16</sup> Gary Wolske, *FOP of Ohio Opposes Issue 1*, FRATERNAL ORD. POLICE OHIO (Sept. 24, 2018), [https://www.fopohio.org/index.cfm?zone=/unionactive/view\\_article.cfm&homeID=726163](https://www.fopohio.org/index.cfm?zone=/unionactive/view_article.cfm&homeID=726163) [on file with *Ohio State Law Journal*].

<sup>17</sup> Veronica M. Perry, OCPOA President stated:

I think we all agree that we have a health epidemic on our hands and treatment is more appropriate than incarceration for individuals who suffer from [substance use disorder] . . . [however], the measure incorrectly assumes that there is an infrastructure in place to handle the onslaught of people that would enter the court system. . . . This approach not only minimizes a judge's ability to sanction after repeated offenses and violations, but it seriously hinders a probation officer's effectiveness in compelling treatment for individuals who may be lacking the motivation to seek help for themselves.

Letter from Veronica M. Perry, President, Ohio Chief Prob. Officers Ass'n, <http://www.ohiojudges.org/Document.ashx?DocGuid=20a86127-337e-401a-a194-082eb2069273> [https://perma.cc/MV3U-98GF].

<sup>18</sup> OACP named the following five ways in which it would impact Ohioans: (1) undermine treatment efforts; (2) hinder the ability to prosecute drug traffickers; (3) reduce sentences of violent offenders; (4) overburden local governments, and; (5) imply to young individuals that drug abuse and addiction is not serious. Letter from Jeffrey Scott, President, Ohio Ass'n of Chiefs of Police, OACP Issue 1 Opinion (Oct. 10, 2018), <https://oacp.org/oacp-issue-1-opinion/> [https://perma.cc/2SND-WND2]. OACP further noted that the proposal would hinder the ways in which drug courts were providing alternative treatment methods to individuals. *Id.*

<sup>19</sup> See Press Release, Buckeye State Sheriffs' Ass'n, *supra* note 10 for a statement in which the Buckeye State Sheriffs' Association emphasized the need for law enforcement to get traffickers off the streets, noting that the proposed amendment would cost law enforcement significant amounts of money, would fuel drug trafficking, and lead to many more deaths in the community.

other law enforcement agencies testifying at congressional hearings on the opioid crisis have similarly argued for the need of the “stick” of incarceration to address the opioid crisis.<sup>20</sup> Law enforcement groups’ support for the stick is not surprising in light of their historic efforts to support the use of punishment to addressing problem drug use.<sup>21</sup>

The use of the “carrots-and-sticks” narrative is part of law enforcement groups’ broader commitment to support a criminal justice approach to addressing the nation’s drug problem—an approach defined by the use of the criminal justice system to deter bad behavior through the threat of punishment.<sup>22</sup> In my previous analysis of congressional hearing testimony preceding the enactment of federal legislation to address the opioid crisis, I found that despite the dominance of the idea that problem drug use is a public health issue, law enforcement groups continued to emphasize the need for the use of the criminal justice system to adequately address the opioid crisis.<sup>23</sup> This commitment to the use of the criminal justice system has endured despite the international trend shifting away from this approach as a means of addressing problem drug use.<sup>24</sup> The international community has widely acknowledged that a public health approach incorporates best practices in substance abuse policy.<sup>25</sup> Although evidence exists to suggest that the criminal justice approach to problem drug use may be transforming, this evolution seems to only be occurring at the margins, a phenomenon that I will discuss *infra*.

In this Article, I explore how public law enforcement groups<sup>26</sup> use narratives to define problem drug use as a criminal justice issue in the wake of the opioid crisis. In doing so, I explain the motivations behind law enforcement groups’ continued support for the criminal justice approach, despite the efforts to redefine problem drug use as a health issue. Using theories of interest group behavior, I argue that law enforcement groups’ support of the criminal justice approach is a result of their attempts to protect and further the interests of their members, attorneys, judges, and police personnel who rely heavily on state and

<sup>20</sup> See, e.g., *Prescription Drug and Heroin Abuse Issues*, *supra* note 2.

<sup>21</sup> See Taled El-Sabawi, *The Role of Pressure Groups and Problem Definition in Crafting Legislative Solutions to the Opioid Crisis*, 11 NE. U.L. REV. 372, 374 (2019).

<sup>22</sup> See *id.*

<sup>23</sup> See generally El-Sabawi, *supra* note 1; El-Sabawi, *supra* note 21.

<sup>24</sup> See El-Sabawi, *supra* note 1, at 1358–59. See generally *Policy and Practice Briefings: Prisons and the Criminal Justice System*, EUR. MONITORING CTR. FOR DRUGS & DRUG ADDICTION, [http://www.emcdda.europa.eu/print/best-practice/briefings/prisons-and-the-criminal-justice-system\\_en](http://www.emcdda.europa.eu/print/best-practice/briefings/prisons-and-the-criminal-justice-system_en) [<https://perma.cc/7FCH-SXDH>] (discussing health intervention strategies in Europe).

<sup>25</sup> See generally *Policy and Practice Briefings*, *supra* note 24.

<sup>26</sup> In my analysis of federal congressional hearing testimonies from 2014–2016 on the opioid crisis, most, if not all, law enforcement interest groups participating publicly in the discourse were public, not private, for-profit actors. Similarly, the position statements of law enforcement groups on Ohio’s Issue 1 came from public groups. Because public law enforcement groups have been most active in the discourse, this Article focuses on the contributions that these public agencies have made to the problem definition discourse in the age of the opioid crisis.

federal budget allocations for survival. I will demonstrate that narratives supported by law enforcement groups in the discourse surrounding the opioid crisis position these criminal justice actors as “fixers”<sup>27</sup> of the drug problem and, in doing so, encourage the allocation of funding and resources necessary to carry out their duties as problem fixers. I will further show how some law enforcement groups have justified their continued roles as fixers of problem drug use, but have done so on a spectrum, suggesting that at least some law enforcement groups have acknowledged the need to re-envision their perceived role in addressing problem drug use.

In Part II of this Article, I provide a short overview of the relevant literature on pressure group behavior and narrative use in the policy process. In Part III of this Article, I report the findings of my empirical analysis of law enforcement groups’ narratives defining the opioid crisis. Although the findings are based on my analysis of the contemporary discourse, I also provide some historical context to allow the reader to better understand the ways in which narrative use has changed over time. In Part IV of this Article, I apply theories of interest group behavior to explain how law enforcement groups have used criminal justice themed narratives in the discourse on the opioid crisis to further the interests of group members. In Part V, I review the variation between law enforcement narrative use, focusing on the differences in the degree of law enforcement jurisdiction and corresponding funding. I highlight that the acceptance of the health-oriented approach is beginning to occur, but only at the margins. I close with a call for research of proposed explanations for the noted variations in law enforcement groups’ acceptance of a health-oriented approach.

## II. BACKGROUND

### A. Pressure Group Behavior

In a pluralist majoritarian democracy, such as the United States, actors join together in groups to protect the interests of their constituents.<sup>28</sup> These organized interest groups lobby to further the interests of their members at each stage of the legislative process.<sup>29</sup> Administrative agencies are also invested in legislative outcomes that will increase or maintain their delegated powers, as well as their operational budgets.<sup>30</sup> By engaging in lobbying efforts that include providing legislative testimony or communicating directly with voters in an effort to sway public opinion,<sup>31</sup> both administrative agencies and organized

<sup>27</sup> DEBORAH STONE, POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING 224 (3d ed. 2012).

<sup>28</sup> See *id.* at 20–22.

<sup>29</sup> See *id.* at 19–36.

<sup>30</sup> See generally El-Sabawi, *supra* note 1 for an in-depth discussion of this contention. See also MEIER, *supra* note 9, at 72–76 (discussing federal drug agency budgets).

<sup>31</sup> Kevin M. Leyden, *Interest Group Resources and Testimony at Congressional Hearings*, 20 LEGIS. STUD. Q. 431, 431–39 (1995); see, e.g., STONE, *supra* note 27, at 28–30.

interest groups pressure legislators or voters to enact legislative proposals or initiatives that support the interests of its group's members.<sup>32</sup> When doing so, pressure groups commonly use a rhetorical tool known as the policy narrative.<sup>33</sup>

### B. Policy Narratives

Policy narratives, especially those describing the causes of a social problem, are powerful rhetorical tools used by organized interest groups to persuade policy actors to adopt preferred policy proposals.<sup>34</sup> As purveyors of information and expertise, pressure groups are particularly well-situated to influence policy by strategically crafting narratives<sup>35</sup> about what caused the policy problem and who or what is to be blamed.<sup>36</sup> These policy stories classify certain actors as either the “bad guys”<sup>37</sup> or the “fixers”<sup>38</sup> of the problem, create new political alliances, and “either challenge or protect an existing social order.”<sup>39</sup> Like fictional narratives, these policy narratives have elements including characters, a problem, and a solution.<sup>40</sup> The process of crafting these narratives may be conscious or unconscious, and the narrating group can start by choosing either the characters, problem, or desired solution.<sup>41</sup> Narrators have leeway in choosing the elements of their narrative and in choosing the order in which they construct it, but all elements of the narrative must still be believable and credible to the intended audience.<sup>42</sup> Although the elements of most policy narratives are consistent, the order in which the story is crafted differs from narrator to narrator, and the decisions the narrating group makes at each of these decision points affects the alternatives available for the remaining story elements.<sup>43</sup> Consequently, policy narratives can narrow the available alternative policy proposals in ways that limit possible proposals to those that are desirable,

<sup>32</sup> See El-Sabawi, *supra* note 21, at 374–76.

<sup>33</sup> Policy narratives are also referred to generally as narratives or stories. For the purposes of this Article, I will not distinguish between the types of policy narratives, but instead will use the term generally to refer to all types of stories used as forms of communication in the policy making process.

<sup>34</sup> See, e.g., El-Sabawi, *supra* note 1, at 1362, 1367 n.48.

<sup>35</sup> Some social narrative scholars also distinguish between stories and narratives. See, e.g., SHAUL R. SHENHAV, ANALYZING SOCIAL NARRATIVES 20–36 (2015). For simplification purposes, I will refer to narratives and stories interchangeably, with the caveat that there is disagreement in the literature as to the differences and similarities of the two constructs.

<sup>36</sup> DEBORAH A. STONE, POLICY PARADOX AND POLITICAL REASON 148–54 (1988).

<sup>37</sup> See, e.g., El-Sabawi, *supra* note 21, at 388–89.

<sup>38</sup> See STONE, *supra* note 27, at 157–82, 224.

<sup>39</sup> *Id.* at 224.

<sup>40</sup> See FRANK FISCHER, REFRAMING PUBLIC POLICY: DISCURSIVE POLITICS AND DELIBERATIVE PRACTICES 161–64 (2003); STONE, *supra* note 27, at 157–82.

<sup>41</sup> See El-Sabawi, *supra* note 21, at 380–85.

<sup>42</sup> See FISCHER, *supra* note 40, at 177–78; see also El-Sabawi, *supra* note 1, at 1366. See generally SHENHAV, *supra* note 35.

<sup>43</sup> See El-Sabawi, *supra* note 21, at 380–85; see also STONE, *supra* note 27, at 206–28 (discussing causal reasoning).

ensuring that the narrating group's members benefit from the legislative proposals and are protected from the burdens of regulation.<sup>44</sup>

In the discourse surrounding problem drug use, law enforcement groups have historically employed narratives that positioned the criminal justice system as the best overseer of responses to problem drug use.<sup>45</sup> They have done so by defining addiction as a deviant behavior and emphasizing punishment as a deterrence for both drug use and drug sales.<sup>46</sup> Although the traditional narrative of deviancy remains a prominent feature of the law enforcement discourse, variations of the deviancy narrative have surfaced as the federal legislative discourse shifts from supporting a criminal justice approach to the opioid crisis to a more health-oriented approach.<sup>47</sup>

### III. LAW ENFORCEMENT GROUPS' NARRATIVES DEFINING THE OPIOID CRISIS

In my analysis<sup>48</sup> of federal congressional hearing testimony from 2014–2016, preceding the enactment of the Comprehensive Addiction and Recovery Act of 2016 (CARA),<sup>49</sup> and position statements by law enforcement groups in

<sup>44</sup> See generally STONE, *supra* note 27.

<sup>45</sup> See El-Sabawi, *supra* note 1, at 1362, 1367 n.48, 1406–07.

<sup>46</sup> *Id.*

<sup>47</sup> This is evidenced by the enactment of the following: Comprehensive Addiction and Recovery Act of 2016 (CARA), Pub. L. No. 114-98, § 601, 130 Stat. 695, 732 (codified at 42 U.S.C. § 290ee-3(b)(2)(B) (2012)); SUPPORT for Patients and Communities Act, H.R. 6, 115th Cong. (2018) (enacted); 21st Century Cures Act, H.R. 34, 114th Cong. (2016) (enacted).

<sup>48</sup> To analyze the congressional hearing testimony, I used both qualitative and quantitative text analysis. I used QDAMiner5 for the qualitative coding and Wordstat7 for the quantitative analysis. I used content analysis methodology to create categories of causal stories and proposed solutions. Once the categories were saturated, meaning causal stories I identified fit into the categories created and no additional categories needed to be created, I identified patterns and broader themes evidenced by the categories.

<sup>49</sup> I chose to analyze law enforcement groups' federal hearing testimony prior to CARA's enactment because it is a sub-analysis of a much larger project on interest group narratives on the opioid crisis. The corpus, or population, of documents for the parent project were compiled by conducting a search on Thomas Reuters Westlaw for congressional hearing testimony using the search terms "addict!" and "overdose!" and limiting the dates to hearings occurring in January 2014 to June 2016. I chose to limit the analysis to hearings occurring within these dates because it would capture the discourse that preceded CARA, which was passed in June 2016. I restricted the dataset to 2014 because of resource constraints. Future research will be needed to determine whether the findings of this Article are time-limited. The terms "addict!" and "overdose!" were chosen because the purpose of my analysis is to capture the discourse on the social problem commonly referred to as the opioid crisis. The opioid crisis has been characterized by high rates of overdose and an acknowledgment of the problem of addiction. I then excluded testimony, or parts of testimony, that discussed methamphetamine use, synthetic drug use, and marijuana use, as these problems were characterized differently than the opioid crisis, a difference I hope to capture in a future analysis. The results were limited to hearings that occurred from 2014 to 2016. Both written and oral testimony were included. I then supplemented these narratives



Ohio on “Issue 1” of a 2018 ballot initiative, I identified four categories of narratives that attempt to define the social problem of drug use, each of which is outlined separately *infra*.

#### A. *The Addict as the “Bad Guy”*

The traditional narrative that explicitly portrays the addict as a deviant is still supported by some law enforcement groups.<sup>50</sup> This narrative places the blame on the person who uses illicit substances for fueling the drug trade and for causing the crime that often accompanies black markets.<sup>51</sup> The individual who uses illicit substances is the “bad guy” in need of punishment, or at least the threat of incarceration, in order to deter his bad behavior.<sup>52</sup> Emphasis on the drug users’ association with the commission of crimes is often used to justify the need to lock away this deviant in order to improve public safety and protect the public from harm.<sup>53</sup> Some of these narratives explicitly challenge the idea that addiction is an illness by arguing that the person is not ill but rather a criminal.<sup>54</sup> In doing so, it supports the idea that addiction should not be used as an excuse for criminal behavior.<sup>55</sup> The policy proposals accompanying this narrative include increased criminal enforcement and the incarceration of the deviant drug user.<sup>56</sup> While this narrative was by no means dominant in the law enforcement narratives that I reviewed, it was epitomized by lengthy testimony given by the Prosecuting Attorneys Association of Michigan when testifying in front of Congress on the opioid crisis, excerpts of which follow:

Prosecutors, as indicated above recognize the need to hold persons accountable for the wide variety of crimes they commit while using these drugs. An addiction is not an excuse for criminal behavior. Incarceration is often appropriate. Dealing with a criminal case involves far more than the

on federal legislation with position statements from law enforcement groups on Ohio’s Issue 1, because (1) they provided a snapshot of narrative use on a state drug policy issue and (2) they addressed an instance in which the initiatives’ success would have resulted in a direct power (and money) transfer from the criminal justice system to the treatment system.

<sup>50</sup> See sources cited *supra* note 2.

<sup>51</sup> *Drugs in Native Communities: Hearing Before the S. Comm. on Indian Affairs*, 114th Cong. (2015) (statement of Darren Cruzan, Director, Office of Justice Services, Bureau of Indian Affairs), [https://www.doi.gov/ocl/hearings/114/dangerousdrugs\\_033115](https://www.doi.gov/ocl/hearings/114/dangerousdrugs_033115) [<https://perma.cc/A6CA-B7UE>] [hereinafter *Drugs in Native Communities*] (“The use of illicit drugs can lead to impaired behavior that results in violence and other criminal behavior. Drug traffickers often engage in violent crimes to facilitate their operations, while persons with substance use disorders generally engage in property crimes to support their addiction.”).

<sup>52</sup> *Prescription Drug and Heroin Abuse Issues*, *supra* note 2.

<sup>53</sup> See, e.g., sources cited *supra* notes 14–19.

<sup>54</sup> *Id.*

<sup>55</sup> In fact, most law enforcement groups that acknowledged the importance of health responses still advocated for increased criminal enforcement alongside the health approach. See, e.g., Press Release, Buckeye State Sheriffs’ Ass’n, *supra* note 10.

<sup>56</sup> See, e.g., *Prescription Drug and Heroin Abuse Issues*, *supra* note 2.

individual defendant. It also includes public safety, sending a message of deterrence to other offenders and the benefit that punishment also provides to a wrongdoer, including but not limited to drug addicts. However, prosecutors also recognize that if treatment can also be incorporated, the chance of recidivism may well be reduced.

Surprising to some, rehabilitative and treatment providers often also see the merit to the use of criminal prosecution to teach accountability and the threat of incarceration as a real life, practical tool to get addicts to embrace treatment, rehabilitation, etc.

Prosecutors, Defense attorneys and again, treatment providers also see the benefit of periods of incarceration to bring sobriety and a “drying out” period and a clear mind to drug offenders, including prescription and heroin offenders.<sup>57</sup>

Using the lens of interest group power politics, the addict-as-a-deviant narrative names the law enforcement lobby as the primary “fixers”<sup>58</sup> of problem drug use in the United States, as law enforcement agencies are experts in punishment. As primary fixers, these groups are in a position of power, in part because legislators consult with them when deciding how to address a social problem.<sup>59</sup> During such consultations, these fixers are able to guide the discourse to their preferred legislative proposals—those that increase criminal enforcement and criminal penalties.<sup>60</sup> Fixers are considered to have the power to describe the target population and the groups affected by the legislation and, in doing so, can construct their deservingness for policy benefits or burdens.<sup>61</sup> Finally, as the primary fixers, they would likely be the recipients of the largest share of federal and state budget allocation to address problem drug use, as those fixing the problem need money to do so.<sup>62</sup>

As much as the addict-as-a-deviant narrative may be preferred by law enforcement, due in part to its depiction of law enforcement as the fixers, such a narrative has fallen out of favor with other pressure groups lobbying on the opioid crisis.<sup>63</sup> These groups have opted for more health-oriented narratives that

<sup>57</sup> *Id.*

<sup>58</sup> See STONE, *supra* note 27, at 224.

<sup>59</sup> Taled El-Sabawi, *What Motivates Legislators to Act: Problem Definition & the Opioid Epidemic, A Case Study*, 15 IND. HEALTH L. REV. 189, 215 (2018).

<sup>60</sup> *Id.* at 217.

<sup>61</sup> See *id.* at 222–25.

<sup>62</sup> *Id.*

<sup>63</sup> It appears, from my review of congressional hearing testimony preceding the enactment of CARA, the deviancy narrative was not dominant in the discourse amongst law enforcement groups’ testimony. Though common historically, such explicit vilifications of persons using illicit substance were outliers in the federal congressional hearing testimony prior to the enactment of CARA. This finding does not mean that the addict-as-a-deviant narrative is not the dominant discourse within the law enforcement community, but rather, the law enforcement groups that were invited to testify before Congress on the opioid crisis were primarily those that did not tell such a narrative with the same conviction as was done

utilize health terminology, with some groups explicitly arguing that addiction is a chronic disease of the brain.<sup>64</sup> If addiction is indeed a chronic disease that changes brain chemistry, and not the result of inert deviance, the disease itself is to blame for addictive behavior.<sup>65</sup> The addiction-as-a-disease narrative can be interpreted as supporting a causal theory that directly disputes the addict-as-a-deviant narrative.<sup>66</sup> The increasing popularity of this conflicting narrative may have driven some law enforcement groups to adjust the deviancy narrative or to develop an alternative narrative altogether. Based on my analysis, the three most popular adjusted or alternative narratives include: (1) the carrots-and-sticks, (2) the drug-traffickers-as-the-bad-guys, and (3) law enforcement as active participants in the health approach.

### B. Carrots and Sticks

The carrots-and-sticks narrative is a modification of the strict addict-as-a-deviant narrative.<sup>67</sup> It combines the idea that those with an addiction need help with the idea that they cannot be helped without the threat of punishment.<sup>68</sup>

The carrots-and-sticks narrative acknowledges that treatment may be effective in addressing problem drug use, but because the addict has a predilection for sinful or pleasurable behavior, punishment must be used as an incentive to correct the bad behavior and ensure compliance with treatment.<sup>69</sup> This coerced-treatment narrative acknowledges the need for treatment, but argues that due to the drug user's weak character, treatment adherence will only

previously. The composition of the law enforcement groups' testimony does indicate, however, that the public tolerance for the addict-as-a-deviant narrative has decreased. This statement is supported not just by the prominence of health-oriented narratives, but also, in the types of stories the law enforcement groups that were selected to testify were telling. In other words, it may not be that the law enforcement lobby has abandoned the deviancy narrative, but that legislators invited law enforcement groups to testify that supported an alternative narrative. See El-Sabawi, *supra* note 21, at 396–98.

<sup>64</sup> See El-Sabawi, *supra* note 21, at 380.

<sup>65</sup> *Addiction Science*, NAT'L INST ON DRUG ABUSE, <https://www.drugabuse.gov/related-topics/addiction-science> [<https://perma.cc/JJG7-SDT9>] (last updated July 2015) (“In reality, drug addiction is a complex disease, and quitting usually takes more than good intentions or a strong will. Drugs change the brain in ways that make quitting hard, even for those who want to.”).

<sup>66</sup> See El-Sabawi, *supra* note 1, at 1359–60.

<sup>67</sup> *Id.* at 1388, 1406.

<sup>68</sup> See, e.g., *Prescription Drug and Heroin Abuse Issues*, *supra* note 2 (quoting one prosecutor who states they have been more successful in getting defendants into drug treatment after the defendant has served jail time); O'Connor, *supra* note 2 (arguing “that drug courts are effective only when they combine the ‘carrot’ of treatment and support with the ‘stick’ of judicial accountability, including incarceration when needed”); Ohio Common Pleas Judges Association, *supra* note 2 (arguing that the threat of prison is what “modif[ies] a dependent defendant’s thinking”); OSBA Statement, *supra* note 2 (arguing that treatment is less likely and effective without “the threat of prison time”); *Safe Harbor*, *supra* note 2 (stating that “addicts are less likely to seek treatment” without the threat of prison).

<sup>69</sup> See sources cited *supra* note 68.

be achieved if the seduction of a high is combatted with the threat of incarceration.<sup>70</sup> This narrative is predicated on the idea that the high of drug use acts as a positive reinforcement for the drug-seeking behavior by assuming that no other positive reinforcement will challenge that of the high. Consequently, the only logical response is punishment,<sup>71</sup> like incarceration, or the use of negative reinforcement,<sup>72</sup> such as releasing prisoners into treatment. The underlying theory is that *the carrot does not work without the stick*.<sup>73</sup>

Law enforcement groups that support this narrative argue that as enforcers of punishment, they are in the best position to provide the punishment needed to ensure compliance with drug treatment. For example, Nancy Parr, City of Chesapeake, Virginia, Commonwealth's Attorney, shared an anecdote during her testimony to demonstrate the effectiveness of carrots-and-sticks.

C.B. was arrested in 2006 and 2007 and, in 2007, was incarcerated for violation of probation on an unauthorized use of a vehicle charge. At that time, she requested and was allowed to enter our Drug Court program. She knew and admitted that she was an addict, she had lost custody of her daughter and she "dried out" in jail. C.B. needed help and the incarceration scared her and "woke her up." She experienced a couple of setbacks in Drug Court but the immediate sanctions reinforced the concept of consequences for all her actions and choices. She successfully completed and graduated in 2009. She has been clean since then, has regained custody of her daughter, and works full time. C.B. stays in contact with my office and thanks me regularly for "locking her up for 60 days."<sup>74</sup>

Specialized courts, called drug courts, offer an institutionalized mechanism for these actors to supervise the process and ensure that persons suffering from problem drug use complete their treatment.<sup>75</sup>

Setting aside arguments about the merits of the carrots-and-sticks narrative, the carrots-and-sticks narrative allows law enforcement actors to incorporate the popular, "health-oriented"<sup>76</sup> solution of treatment, but does so in a way that ensures the use of the criminal justice system to oversee the treatment

<sup>70</sup> *Id.*

<sup>71</sup> Punishment is the addition of a negative stimuli. See generally Alan Baron & Mark Galizio, *The Distinction Between Positive and Negative Reinforcement: Use with Care*, 29 BEHAV. ANALYST 141 (2006).

<sup>72</sup> See generally *id.*

<sup>73</sup> See, e.g., O'Connor, *supra* note 2 (arguing that drug courts must retain the option to punish addicts in order to be effective).

<sup>74</sup> *America's Growing Heroin Epidemic: Hearing on H.R. 953 Before the H. Subcomm. on Crime, Terrorism, Homeland Sec., and Investigations*, 114th Cong. 65–66 (2015) (statement of Nancy G. Parr, Commonwealth's Attorney, City of Chesapeake, Virginia), [https://republicans-judiciary.house.gov/wp-content/uploads/2016/02/114-45\\_95685.pdf](https://republicans-judiciary.house.gov/wp-content/uploads/2016/02/114-45_95685.pdf) [<https://perma.cc/68ZF-FMD4>].

<sup>75</sup> Tiger, *supra* note 4, at 171–73.

<sup>76</sup> Throughout this Article, I use the term "health-oriented" to refer to solutions that are interpreted by some as health solutions and not to effectively claim that a particular type of solution is, indeed, a health solution.

mechanism.<sup>77</sup> This concession allows for some drug policy funding to be directed into the treatment system, but it also maintains a role for law enforcement groups.<sup>78</sup> The carrots-and-sticks narrative allows law enforcement to address calls for increasing access to treatment but does so in a way that makes most likely the continued flow of funding dollars into the criminal justice system. Moreover, law enforcement groups maintain their role as enforcers of legislation governing illicit drug possession and as overseers of the treatment process. In sum, while the carrots-and-sticks narrative acknowledges the need for treatment and “tosses a carrot” to the health advocates, it simultaneously allows the law enforcement lobby to retain power and budget allocations.

While this narrative may be commonplace in the discourse on state drug policy issues,<sup>79</sup> it was not prevalent in the congressional hearing testimony of law enforcement groups on the opioid crisis between 2014 and 2016.<sup>80</sup> The narrative’s popularity in Ohio’s Issue 1 discourse may have been because of Issue 1’s explicit mandate of the transfer of funds from the criminal justice system to the treatment system as a means for addressing the opioid crisis.<sup>81</sup> Such a transfer of funds would conceivably be accompanied by a transfer of power from the criminal justice system to the treatment system. The carrots-and-sticks narrative allowed for law enforcement actors to address the call for treatment while maintaining the control and funding that Issue 1 sought to redirect.

### C. *The Drug Traffickers as the Bad Guys*

An alternative narrative that appeared with more frequency at the federal level was the drug-traffickers-as-the-bad-guys narrative.<sup>82</sup> Similar to the carrots-and-sticks narrative, the drug-traffickers-as-the-bad-guys narrative allows law enforcement to concede the benefits of treatment, while still maintaining their roles as fixers. This narrative characterizes the drug traffickers, instead of the drug users, as the bad guys—or the group to blame for causing the nation’s drug problems.<sup>83</sup> Within the federal congressional law

<sup>77</sup> See O’Connor, *supra* note 2.

<sup>78</sup> See *id.*

<sup>79</sup> See, e.g., *supra* text accompanying note 12.

<sup>80</sup> See El-Sabawi, *supra* note 21, at 380–94.

<sup>81</sup> Ohio Issue 1, *supra* note 11; see sources cited *supra* note 2.

<sup>82</sup> See, e.g., *Community Solutions to Breaking the Cycle of Heroin and Opioid Addiction: Hearing Before S. Comm. on the Judiciary*, 113th Cong. 2 (2015) (statement of Tristram J. Coffin, United States Attorney, District of Vermont), [https://www.justice.gov/sites/default/files/testimonies/witnesses/attachments/2016/02/19/03-17-14\\_usa\\_coffin\\_testimony\\_re\\_community\\_solutions\\_to\\_breaking\\_the\\_cycle\\_of\\_heroin\\_and\\_opioid\\_addiction\\_web\\_ready.pdf](https://www.justice.gov/sites/default/files/testimonies/witnesses/attachments/2016/02/19/03-17-14_usa_coffin_testimony_re_community_solutions_to_breaking_the_cycle_of_heroin_and_opioid_addiction_web_ready.pdf) [<https://perma.cc/8YVW-4NZA>] (discussing “prosecuting traffickers who seek to profit out of selling this misery”).

<sup>83</sup> See, e.g., *Community Solutions to Breaking the Cycle of Heroin and Opioid Addiction*, *supra* note 82, at 2 (statement of Tristram J. Coffin, United States Attorney, District of Vermont) (describing a heroin user as a “treasured son” and the heroin dealer as the villain responsible for the heroin user’s death).

enforcement testimony, these drug traffickers were commonly described as doctor dealers,<sup>84</sup> organized criminal enterprises,<sup>85</sup> or foreign drug cartels<sup>86</sup> that capitalize on persons struggling with addiction. By blaming these actors,

<sup>84</sup> See *Border Security and America's Heroin Epidemic: The Impact of the Trafficking and Abuse of Heroin and Prescription Opioids in Wisconsin: Hearing Before S. Comm. on Homeland Sec. and Governmental Affairs*, 114th Cong. 64 (2016) (statement of Timothy Westlake, M.D., Vice Chairman, State of Wisconsin Medical Examining Board, Chairman, Controlled Substance Committee), <https://www.hsdl.org/?view&did=810511> [<https://perma.cc/FLN4-YXWT>] [hereinafter *Wisconsin Heroin Epidemic*] (“[T]here are the prescribers that know what they are doing and intentionally profit from the prescribing—I see them as the ‘doctor dealers.’ . . . The ‘doctor dealers’ will and should be addressed by law enforcement and state medical examining boards.”); *Opioid Use Among Seniors—Issues and Emerging Trends: Hearing Before S. Special Comm. on Aging*, 114th Cong. 2 (2016) (statement of Sean Cavanaugh, Deputy Administrator And Director, Center For Medicare, Centers For Medicare & Medicaid Services), [https://www.aging.senate.gov/imo/media/doc/SCA\\_CMS\\_Cavanaugh\\_2\\_24\\_16.pdf](https://www.aging.senate.gov/imo/media/doc/SCA_CMS_Cavanaugh_2_24_16.pdf) [<https://perma.cc/3LTR-NN9J>] (discussing how “pill mills” are a term that is used by law enforcement groups in order to “describe a physician, clinic, or pharmacy that is prescribing or dispensing prescription opioids for non-medical purposes, and where the prescription opioids are often diverted for sale on the illicit market”); *America's Heroin Epidemic at the Border: Local, State, and Federal Law Enforcement Efforts to Combat Illicit Narcotic Trafficking: Hearing Before S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. (2015) (statement of Natalie Dawn Mertz, Executive Director, Arizona High Intensity Drug Trafficking Area, Office of National Drug Control Policy), <https://www.hsdl.org/?view&did=793249> [<https://perma.cc/92LY-G995>] [hereinafter *Heroin Addiction and Drug Trafficking*] (discussing fraudulent prescriptions, doctors, and pain clinics and the role they play in the opioid epidemic).

<sup>85</sup> See *Wisconsin Heroin Epidemic*, *supra* note 84, at 5–6 (statement of James F. Bohn, Executive Director Wisconsin High Intensity Drug Trafficking Areas Program (Wisconsin High Intensity Drug Trafficking Area), Office of National Drug Control Policy) (discussing Chicago and Wisconsin organized crime syndicates); see also *Examination of the Office of National Drug Control Policy and Its Efforts to Coordinate Drug Policy Across the Federal Government*, 114th Cong. 2 (2015) (statement of David W. Kelley, Congressional Affairs Liaison, National High Intensity Drug Trafficking Area Directors Association, Deputy Director, New England High Intensity Drug Trafficking Area), <https://republicans-oversight.house.gov/wp-content/uploads/2015/12/Kelley-NEHIDTA-Statement-12-1-ONDCP.pdf> [<https://perma.cc/L5YU-EGL5>] (“Drug trafficking organizations that prey upon our communities and the criminal activity associated with them can be found in every part of the United States.”).

<sup>86</sup> See, e.g., *Heroin Addiction and Drug Trafficking*, *supra* note 84 (statement of Bill Montgomery, Attorney, Maricopa County); *Examining the Growing Problems of Prescription Drug and Heroin Abuse: State and Local Perspectives: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Commerce*, 114th Cong. (statement of Corporal Michael Griffin, Special Investigations Division, Tulsa Police Department), <https://docs.house.gov/meetings/IF/IF02/20150326/103254/HHRG-114-IF02-Wstate-GriffinM-20150326.pdf> [<https://perma.cc/Z7KE-8EF9>]; *Posture Statement Before H. Armed Servs. Comm.*, 113th Cong. 7–8 (2014) (statement of General John F. Kelly, Commander, United States Southern Command, United States Marine Corps), [https://defenseinnovationmarketplace.dtic.mil/wp-content/uploads/2018/02/SOUTH\\_COMM\\_Wstate-KellyUSMCJ-20140226.pdf](https://defenseinnovationmarketplace.dtic.mil/wp-content/uploads/2018/02/SOUTH_COMM_Wstate-KellyUSMCJ-20140226.pdf) [<https://perma.cc/BD6P-GUTG>] [hereinafter *General Kelly Statement*]; *Heroin Addiction and Drug Trafficking*, *supra* note 84 (statement of Mark J. Dannels, Sheriff, Cochise County, Arizona).

narrators indicate that these actors are deserving of punishment—punishment that should be carried out by increased or continued criminal enforcement.<sup>87</sup>

In a variation of this narrative, some narrators explicitly differentiated between drug traffickers and drug users, describing drug users as victims being preyed upon by greedy drug traffickers.<sup>88</sup> For example, Gary Wolske, the Fraternal Order of Police Ohio's President stated, "[W]e must find a way to keep the violent criminals and those selling drugs behind bars, while giving those in the throes of addiction a path to better health."<sup>89</sup> To provide evidence of the benefits of the ongoing enforcement, many of these narratives cited to statistics and examples of cases in which law enforcement agencies intercepted large quantities of drugs or prosecuted particularly nefarious drug dealers.<sup>90</sup>

The drug-traffickers-as-the-bad-guys narrative was particularly useful to federal law enforcement agencies, regional law enforcement coalitions, and law enforcement agencies in localities that bordered Mexico.<sup>91</sup> These law enforcement groups have jurisdiction over persons participating in the importation of illicit drugs, and by portraying foreign drug actors as the villains, they became the important fixers who could disrupt the networks of these villains by intercepting large shipments of illicit substances.<sup>92</sup> These narratives established the importance of border security, interdiction, and larger-scale drug busts in addressing the opioid crisis.<sup>93</sup> And, they enabled these law enforcement

<sup>87</sup> See sources cited *infra* notes 90–91.

<sup>88</sup> Such a distinction is not necessarily supported by empirical evidence, as often those who deal drugs also use them. See, e.g., Kathryn Casteel, *A Crackdown on Drug Dealers Is Also a Crackdown on Drug Users*, FIVETHIRTYEIGHT (Apr. 5, 2018), <https://fivethirtyeight.com/features/a-crackdown-on-drug-dealers-is-also-a-crackdown-on-drug-users/> [https://perma.cc/R3DC-VYEX].

<sup>89</sup> Wolske, *supra* note 16.

<sup>90</sup> See, e.g., *General Kelly Statement*, *supra* note 86, at 3–7; *Heroin Addiction and Drug Trafficking*, *supra* note 84. Historically, to demonstrate the need for continued funding of the criminal justice approach to problem drug use, arrests of high-ranking members of drug cartels or large seizures of illicit drugs, and not the lay drug user or dealer arrest, has been used as a determinative a measure of success. See JOSEPH F. SPILLANE, *Building a Drug Control Regime, 1919–1930*, in *FEDERAL DRUG CONTROL: THE EVOLUTION OF POLICY AND PRACTICE* 25, 25–59 (Jonathon Erlen & Joseph F. Spillane eds., 2004) (discussing the historic use of statistics by law enforcement to establish the need for continued criminal enforcement).

<sup>91</sup> See, e.g., *General Kelly Statement*, *supra* note 86, at 12–18; *Wisconsin Heroin Epidemic*, *supra* note 84 (statement of R. Gil Kerlikowske, Commissioner, U.S. Customs and Border Protection, U.S. Department of Homeland Security), at 24.

<sup>92</sup> See, e.g., sources cited *supra* note 91.

<sup>93</sup> See *The New Era in the Fight Against Methamphetamine in Iowa: Hearing Before S. Judiciary Comm.*, 114th Cong. (2015) (statement of Corbin Payne, Lieutenant, Tri-County Drug Enforcement Task Force, Waterloo, Iowa), <https://www.judiciary.senate.gov/imo/media/doc/10-13-15%20Payne%20Testimony.pdf> [https://perma.cc/TN8L-QYAJ]; *Drugs in Native Communities*, *supra* note 51 (statement of Andrew C. Hanson, Special Agent, Wyoming Division of Criminal Investigation, State of Wyoming Attorney General).

groups to position themselves, alongside the health actors, as integral to solving the opioid crisis.<sup>94</sup>

In sum, the focus on the drug-traffickers-as-the-bad-guys and the narrative distinction between the drug dealer and the drug user accomplishes certain political objectives. First, it allows law enforcement groups to maintain the need for the criminal enforcement that they provide. Second, it does so in a way that does not challenge groups that characterize addiction as a disease or a health problem. It obviates the need to directly contradict popular narratives of addiction as a brain disease or a health issue, thereby avoiding a battle of narratives with members of a politically powerful health industry that supports these health narratives. Law enforcement groups could even partner with the health narrative coalition, to address public safety, while health actors increase access to needed substance abuse treatment. Reciprocally, if health-oriented actors find this law enforcement narrative credible and believable, they can support it without sacrificing their narrative.<sup>95</sup> Finally, by recasting the narrative role of the bad guy from the drug user to the drug trafficker, these law enforcement groups avoid seeming out of step with national trends in public opinion, which show an increasing acceptance of the idea that addiction is a brain disease as opposed to a moral failing.<sup>96</sup> By recasting the bad guy and conceding the benefits and need for treatment, these law enforcement narrators could accomplish their policy objectives, while potentially lowering political costs.

#### *D. Law Enforcement Groups as Active Participants in the Health Approach*

Some law enforcement groups embraced the definition of problem drug use as a health problem, citing to frustration of the tools of punishment at their disposal and expressing the desire to help members of their community<sup>97</sup> in

<sup>94</sup> *Drugs in Native Communities*, *supra* note 51.

<sup>95</sup> See *Legislative Proposals to Combat Drug Abuse: Hearing Before the Subcomm. on Health of the H. Comm. on Energy and Commerce*, 114th Cong. (2015) (statement of Robert Corey Waller, M.D., M.S., Chair, Legislative Advocacy Committee, American Society of Addiction Medicine); see also *21st Century Cures: Incorporating the Patient Perspective: Hearing Before the Subcomm. on Health of the H. Comm. on Energy and Commerce*, 113th Cong. (2014) (statement of Richard F. Pops, Chief Executive Officer Alkermes, Inc.).

<sup>96</sup> J. Baxter Oliphant, *Prescription Drug Abuse Increasingly Seen as a Major U.S. Public Health Problem*, PEW RES. CTR. (Nov. 15, 2017), <https://www.pewresearch.org/fact-tank/2017/11/15/prescription-drug-abuse-increasingly-seen-as-a-major-u-s-public-health-problem/> [<https://perma.cc/N2PV-P27X>] (finding that 76% of public believes prescription drug abuse is a very or extremely serious public health problem in the United States).

<sup>97</sup> *America's Insatiable Demand for Drugs: Hearing Before S. Comm. on Homeland Sec. and Governmental Affairs*, 114th Cong. 114-722 368 (2016) (statement of Frederick Ryan, Chief of Police, Police Assisted Addiction Recovery Initiative (PAARI)), <https://www.hsdl.org/?abstract&did=810472> [<https://perma.cc/9V3E-8FQ5>] (“Those



ways that do not involve incarceration.<sup>98</sup> These narrators often agreed that addiction was a disease and that those suffering SUDs should be diverted away from the criminal justice system and to health actors for treatment.<sup>99</sup> These law enforcement groups commonly argued that they could not “arrest [their] way out of the problem”<sup>100</sup> and encouraged legislators to allocate more money for treatment services.<sup>101</sup>

However, rather than espousing a health-oriented approach that appointed health actors as the only fixers, these law enforcement narrators created a role for themselves within the health-oriented approach. For some, this role included the provision of overdose reversal medication to overdose victims.<sup>102</sup> For others, it involved delivering persons suffering from SUDs, not only to emergency rooms, but also to points of entry into the treatment system, where the individual could receive on-demand treatment.<sup>103</sup> Other groups argued that law enforcement officials were best positioned to engage in prevention efforts, specifically in preventing youth drug initiation through education efforts.<sup>104</sup>

suffering from substance use disorders are not our enemies. They are our sons, our daughters, [and] our neighbors . . . [a]nd, this notion that we are at war with them must be abandoned.”).

<sup>98</sup> *Id.* at 370 (“The fact that law enforcement is recognizing this as a disease that needs to be treated into remission, rather than a crime that requires arrest and incarceration, has had a positive impact in communities throughout America.”).

<sup>99</sup> Frederick Ryan stated:

We, as law enforcement, cannot solve this problem alone—and we must stop telling America that, with just some more resources, we can do so. In fact, a strategy that relies largely on law enforcement and arrest, especially aimed at low-end users, only fuels the epidemic and complicates the chances for long-term recovery.

*Id.* at 367.

<sup>100</sup> See Jill Westmoreland Rose, Opinion, *We Can’t Arrest Our Way out of Growing Opioid and Heroin Epidemic*, CHARLOTTE OBSERVER, <https://www.charlotteobserver.com/opinion/op-ed/article103032432.html> [<https://perma.cc/8LNU-SD2A>]; see also, e.g., *America’s Insatiable Demand for Drugs*, *supra* note 97, at 368 (“Every person with a substance abuse problem that I have talked to has said that arrest and prosecution has never been a deterrent.”).

<sup>101</sup> See, e.g., sources cited *supra* note 93.

<sup>102</sup> See, e.g., *Deadly Synthetic Drugs: The Need to Stay Ahead of the Poison Peddlers: Hearing Before S. Comm. of the Judiciary*, 114th Cong. (2016) (statement of Douglas C. Throckmorton, M.D., Deputy Director, Regulatory Programs, Center for Drug Evaluation and Research, U.S. Food and Drug Administration), <https://www.fda.gov/news-events/congressional-testimony/deadly-synthetic-drugs-need-stay-ahead-poison-peddlers> [<https://perma.cc/RBC4-6CFG>].

<sup>103</sup> See *Attacking America’s Epidemic of Heroin and Prescription Drug Abuse: Hearing Before S. Comm. of the Judiciary*, 114th Cong. (2016) (Statement of Enoch F. Willard, Chief of Police, Manchester Police Department), <https://www.judiciary.senate.gov/imo/media/doc/01-27-16%20Willard%20Testimony.pdf> [<https://perma.cc/WZ3G-YL4S>] (“A 24-hour continuum of care facility will be opening in the spring, which will allow 24-hour access to care for anyone seeking treatment, while affording my department a more compassionate alternative to arrest.”).

<sup>104</sup> See, e.g., *Prescription Drug and Heroin Abuse Issues*, *supra* note 2.

The narratives reviewed in this subsection share two characteristics: they endorse the health approach and recast law enforcement actors as coordinators of care or prevention specialists rather than enforcers of punishment. Despite being most in alignment with the dominant health-oriented narrative, the law-enforcement-as-participants narrative was overshadowed by narratives calling for increased criminal enforcement.<sup>105</sup>

The lack of popularity of the law-enforcement-as-participants narrative could be attributed to its potential effects on funding allocations. If law enforcement actors become mere participants within the health actor's approach, as opposed to the architects and enforcers of their own approach, then they need fewer resources than previously needed for enforcement. The shift in responsibility could call for transfers of both power and funding away from the criminal justice system and to the health system to address problem drug use.<sup>106</sup> Such a shift, if enacted wholesale, would decrease the number of criminal justice personnel or the resources available to the criminal justice system as a whole. Such an outcome would not be in the best financial interest of law enforcement actors and may explain the narrative's lack of frequency within the discourse. Notwithstanding its infrequency, this narrative's mere presence in the discourse is noteworthy because of the degree to which it departs from historic law enforcement approaches to addressing problem drug use.<sup>107</sup>

#### IV. THE LAW ENFORCEMENT NARRATIVE CONTINUUM

The narratives reviewed above differ in the degree to which they support the dominant health-oriented approach to the opioid crisis, with some narratives side-stepping the discussion, other narratives challenging the logic behind the health-oriented approach, and others embracing the approach. These narratives also vary in their depiction of persons with SUDs. Some narratives used by law enforcement to define the opioid crisis adhere to the traditional portrayal of the drug user as a deviant,<sup>108</sup> some shift the blame to the drug traffickers,<sup>109</sup> and others challenge the portrayal of the drug user as a deviant, recasting him instead as a person with an illness.<sup>110</sup> Despite these differences, and their social justice implications, each of these narratives implicitly appoint the law enforcement lobby as "fixers" of the drug problem—fixers who are deserving of resource

<sup>105</sup> See, e.g., *Deadly Synthetic Drugs: The Need to Stay Ahead of the Poison Peddlers*, *supra* note 102; *The New Era in the Fight Against Methamphetamine in Iowa: Field Hearing Before the S. Comm. on the Judiciary*, 113th Cong. (2015) 1–2 (testimony of Steven F. Lukan, Director, Iowa Governor's Office of Drug Control Policy).

<sup>106</sup> See Ohio Issue 1, *supra* note 11.

<sup>107</sup> See generally David F. Musto, *A Brief History of American Drug Control*, 6 OAH MAG. HIST. 12 (1991).

<sup>108</sup> See, e.g., *Prescription Drug and Heroin Abuse Issues*, *supra* note 2 ("[S]ignificant drug activity creates a generation of addicts who in turn sell drugs, steal property, rob and—as a result of drug altered states, assault and kill—other citizens as part of a vicious cycle.").

<sup>109</sup> See, e.g., sources cited *supra* notes 89–90.

<sup>110</sup> See, e.g., sources cited *supra* note 93.

allocations to carry out their duties. These narratives define problem drug use in ways that increase the likelihood that law enforcement actors will be allocated a share of the appropriations set aside to address the opioid crisis. These narratives also refute the proposition that law enforcement groups are no longer needed to address drug use—a proposition that threatens the survival of criminal justice institutions by placing in jeopardy drug enforcement funding, which pays for salaries and needed resources.<sup>111</sup>

The law enforcement narratives defining the opioid crisis could be ranked based on their effects on two primary factors: the degree to which the narrative depicts law enforcement agents as fixers of the problem (“degree of involvement”) and the amount of federal monies that would be needed to fund that particular degree of involvement. The ranking depicted in Figure 1, *infra*, begins with the narrative that supports the greatest degree of involvement and justifies the greatest degree of funding.<sup>112</sup>

Figure 1: *Relative Funding as a Function of Proposed Degree of Involvement in Addressing Problem Use*

Degree of Involvement	Primary Fixers	Overseers of the Fixing	Partial Fixers	Coordinate the Fixing	Not Our Problem to Fix
Narrative	Incarcerate/punish drug users & traffickers	Treatment only works best with the threat of incarceration	Treatment system may be best for users but punishment is needed for traffickers	Law enforcement can help prevent drug use through education, reverse overdoses, & link users to treatment	--
Level of Funding Needed	\$\$\$\$	\$\$\$	\$\$	\$	--

The typology of law enforcement narratives depicted in Figure 1 suggests that law enforcement groups envision their roles in addressing problem drug use as evolving—with some law enforcement groups clinging to the idea that they

<sup>111</sup> See generally Patrick Murphy, *Keeping Score: The Frailties of the Federal Drug Budget*, RAND CORP. (1994), [https://www.rand.org/pubs/issue\\_papers/IP138/index2.html](https://www.rand.org/pubs/issue_papers/IP138/index2.html) [<https://perma.cc/R7TE-YS2X>] (explaining how drug enforcement budgets are calculated).

<sup>112</sup> The level of funding needed is not an estimate of the amount of funding that would actually be needed. It is simply an ordinal ranking of predicted funding levels.

are the primary fixers and others willing to take more secondary roles as active actors within a health-oriented approach. Since budgets are often fixed and resources are scarce, it stands to reason that the greater the role a group has in fixing a problem, the greater allocation of resources they will receive. Based on this logic, groups seeking to further their members' interests should, hypothetically, prefer narratives that depict their group as the primary fixer of the problem. As applied to problem drug use, this hypothesis would predict that the addict-as-a-deviant narrative would be the narrative most frequently used. However, I found that this narrative has fallen out of favor with law enforcement groups weighing in on the opioid crisis.<sup>113</sup> I have yet to conduct an empirical analysis of variables that influenced this evolution of law enforcement narratives within drug policy, but the following theories may provide scholars with a useful starting point.

It could be electorally costly for legislators to award benefits to groups that are viewed as greedy,<sup>114</sup> or as sacrificing the public's interest for its members' financial gain.<sup>115</sup> Therefore, for a narrative to motivate legislators to act, it should demonstrate how the benefits, or funding, awarded will be used to further the public's best interest.<sup>116</sup> The narrative should also resonate with and be believable to its intended audience of legislators and voting constituents.<sup>117</sup> This suggests that for law enforcement groups to be successful they must consider widely held beliefs when deciding which amongst the available narratives to support. In districts or states where the perceived public opinion supports the explicit characterization of persons with SUDs as deviants, law enforcement groups will be rewarded for using the addict-as-a-deviant narrative—the narrative that awards law enforcement groups the greatest jurisdictional powers (and benefits)—with little political costs.

Alternatively, for law enforcement groups concerned with the political consequences of vilifying overdose victims that are the sons and daughters of their voting constituents, the carrots-and-sticks narrative offers a suitable alternative. The carrots-and-sticks narrative acknowledges that persons with SUDs may be deserving of the opportunity to receive treatment, but also reinforces the need for the criminal justice system to ensure treatment adherence.<sup>118</sup> Like the addict-as-a-deviant narrative, the carrots-and-sticks calls for control, power, and funding dollars to remain within the criminal justice system. Law enforcement groups that support this narrative may find that it addresses the frustration of family members who are unable to force their loved

<sup>113</sup> El-Sabawi, *supra* note 1, at 1359.

<sup>114</sup> Anne Larason Schneider & Helen Ingram, *POLICY DESIGN FOR DEMOCRACY* 25 (1997); *see also* VIRGINIA GRAY ET AL., *INTEREST GROUPS AND HEALTH CARE REFORM ACROSS THE UNITED STATES* 5–40 (Gerard W. Boychuk et al. eds., 2013).

<sup>115</sup> Anne Schneider & Helen Ingram, *Social Construction of Target Populations: Implications for Politics and Policy*, 87 AM. POL. SCI. REV. 334, 342–43 (1993).

<sup>116</sup> El-Sabawi, *supra* note 1, at 1362–63, 1369, 1380.

<sup>117</sup> *Id.* at 1366.

<sup>118</sup> *See, e.g.,* O'Connor, *supra* note 2.

one into treatment or who are unable to provide the familial support often needed to ensure treatment placement and completion.

Law enforcement groups in districts or states where the idea that addiction-as-a-disease is most accepted, however, may alienate voting constituents with the addict-as-a-deviant narrative or the carrots-and-sticks narrative for the reasons reviewed in the previous section.<sup>119</sup> For these law enforcement groups, narratives that support the health-oriented approach, an approach aligned with the accepted addiction-as-a-disease causal story, may better position the law enforcement group and its elected or appointed leaders as allies to the public. Elected officials of these law enforcement groups may decide that supporting the health-oriented approach has electoral advantages and therefore be willing to take these electoral benefits over the additional funding that would come with a criminal justice approach.

At this point, however, the theories in this section lack empirical or statistical proof. Each of the theories will need to be tested and additional empirical work will need to be conducted to determine the degree to which electoral considerations and shifts in public opinion influence the narratives used by law enforcement groups.

## V. CONCLUSION

Like other organized interest groups, law enforcement groups take part in the problem definition discourse, during which they offer narratives that represent a social problem in a manner that best furthers the interest of their group members. For decades, the dominant narrative offered to Congress in support of legislative proposals to address problem drug use depicted the drug user as the deviant in need of punishment at the hands of law enforcement agencies.<sup>120</sup> Given the benefits afforded to law enforcement in accordance with such a narrative, it is no surprise that some law enforcement groups preferred narratives of deviancy when taking part of the discourse on the opioid crisis.

However, the legislative discourse has shifted, with both conservative and liberal legislators shying away from the “fire and brimstone” stories of evil and doom that once dominated the drug policy discourse. Their collective tone has softened. As such, some law enforcement groups’ continued and unwavering commitment to the stories of the past appear antiquated and out of touch with popular opinion. In localities that have been resistant to attempts to destigmatize addiction and drug use, such a stance may not cause elected law enforcement officials to be concerned for their re-election. Conversely, these officials may be rewarded, electorally and financially, by constituents that continue to vilify drug users.

Despite the persistence of the addict-as-deviant narrative at the margins, a majority of law enforcement groups that were active in the congressional public discourse have abandoned the express vilification of persons with SUDs.

<sup>119</sup> *Supra* Part III.

<sup>120</sup> See Musto, *supra* note 107 (providing a general history of federal drug enforcement).

Instead, some have embraced narratives that characterized drug traffickers as the bad guy, while others have gone so far as creating a new role for law enforcement actors within a more health-oriented response framework. This evolution of narratives suggests that the criminal justice groups' traditional role as the ultimate fixers of problem drug use is being redefined in the policy discourse on the opioid crisis, at least by some law enforcement groups—despite this redefinition requiring law enforcement groups to relinquish some of their power over drug policy. Law enforcement groups willing to accept that such a redefinition is inevitable have re-envisioned their roles strategically so as to ensure that they are still fixers of sort. These groups redefined their own roles in ways that protected their interests—even painted themselves as heroes—as opposed to allowing other groups to relegate them as obsolete or to claim that they are part of the problem. If the definition of problem drug use as a health-oriented issue is durable, then law enforcement groups that refuse to adjust their narratives to account for the shifts in the discourse risk becoming a drug policy anachronism, at best, or, at worst, as the new bad guys of the current drug policy reform narrative.